RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

GEORGE A. HAWKINS AND OTHERS: APPEAL FROM PROBATE.

The Bankrupt Act does not absolutely and totally suspend or abrogate state insolvent laws.

A voluntary assignment by a debtor, good at common law and made in the form prescribed by the insolvent law of the state, held valid, although the United States bankrupt act was in existence and applicable to the case at the time of the assignment.

And the proceedings of the probate court in administering upon the insolvent estate so assigned held valid.

APPEAL from sundry decrees of a court of probate in the settlement of an insolvent estate, assigned for the benefit of creditors under the insolvent law of the state, taken to the superior court in Windham county, and reserved by that court for the advice of this court. The case is sufficiently stated in the opinion.

Penrose and *Phillips*, for the appellants.

Halsey, for the appellee.

CARPENTER, J.—On the 6th day of August, 1867, J. and W. Cocking, partners in business, made an assignment of their property to trustees, for the benefit of their creditors under the insolvent laws of this state.

The Bankrupt Law of the United States, approved March 2d 1867, was then in full force. The trustees were proceeding with the settlement of said trust, under the direction of the court of probate, when, on the 23d day of October 1867, the appellants, being creditors, appealed to the superior court from certain decrees of the court of probate relative thereto.

The reasons for appeal, which are demurred to, show that the case is within the purview of the Bankrupt Act. The appellants claim that the effect of the Bankrupt Act was to suspend the Insolvent Law of this state *in toto*. The appellees claim that the state law exists in full force until the Bankrupt Law attaches itself to the person or property of the debtor by proceedings in bankruptcy. The appellants in support of their position cite, among other cases, the case of *Griswold* v. *Pratt*, 9 Metcalf 16. In that case it was directly decided that the national Bankrupt

Act of 1841, *ipso facto* suspended and abrogated, during the continuance of such law, the insolvent law of the state of Massachusetts. The appellees rely upon *Ziegenfuss's Case*, 2 Iredell's Law R. 463, which sustains the broad position assumed by them. The decision of this question does not seem to us essential to a disposition of this case. This assignment was voluntary on the part of the debtors. There is nothing in the case to show that any fraud was intended, or that the parties were attempting to defeat the operation of the Bankrupt Act. So far as appears the assignment, and the proceedings under it, were but the means adopted by the parties for distributing the effects of the insolvent debtors *pro rata* among all their creditors.

It is to be noticed that our Insolvent Law does not give validity to assignments under it. It simply provides that unless such assignments are made in a certain manner they shall be void; and they derive their force from the common law, and not from the statute. All that the statute supplies is the mode of administering the insolvent estate under the assignment. But these provisions of the statute, which have for their sole object the distribution of the estate among the creditors *pro rata*, in the most economical and expeditious manner, are nothing but what the assignment itself might contain and express. In that case, the case would become merely one of a private trust, needing no help from any statute, and which could be enforced by a court of equity like any other trust. These assignments are generally, perhaps always, made in express terms "under the statute," &c., which is equivalent to an incorporation of all the provisions of the statute in the assignment itself; in which case the trust would be complete without any aid from the statute, and the settlement of the insolvent estate would proceed under the trust thus created precisely as under the statute, except that what is now done under orders of the court of probate, would be done under the terms of the trust, and under the supervision of a court of chancery. The debtor may, if he and the creditors can agree, make a distribution of his effects without the aid of law. Such a transaction would not be adjudged illegal. He may, so far as he is concerned, permit his property to be taken by process of attachment under a state law, and thereby prevent a distribution of his effects by the Bankrupt Act; yet it will not be contended that the operation of all attachment laws is suspended. Upon the same principle we see

no reason why he may not distribute his effects through the instrumentality of the insolvent laws of the state, so long as the rights of creditors are not thereby prejudiced. The record discloses nothing to indicate that creditors will suffer unjustly from this proceeding. We cannot say as matter of law that the assets of the debtors can be administered more economically or expeditiously in the United States courts than in the state courts. It is true creditors took this appeal. What motive induced them to do so does not appear. It is suggested, however, that a lien in their favor, created by attachment, was dissolved by the assignment. If so, and the assignment is invalidated and the lien preserved, they thereby gain an advantage over other creditors. As that would contravene the policy of the Bankrupt Act, as well as of our own law, we should hardly feel disposed to sanction the appellants' claim, as applied to this case, unless the law rigidly demanded it. Under the circumstances we think that such an assignment as the one here in question may be sustained, without deciding that a state insolvent law authorizing an assignment in insolvency, which would be unauthorized without the statute, would not be suspended by the United States Bankrupt Act.

Since this case was argued our attention has been called to a decision by Judge NELSON, in the Circuit Court of the United States for the Southern District of New York, having an important bearing upon the question now under consideration. The case was *John Sedgwick, Assignee*, v. *James K. Place and Others*, reported in the Weekly Bankrupt Register, vol. 1, p. 204 (June 29th 1868). In that case the bankrupts, being insolvent, suspended payment November 20th 1867, and soon after made an assignment of their property to trustees for the benefit of all their creditors under a statute law of the state of New York. In February following they applied by petition for the benefit of the Bankrupt Act. They were adjudged bankrupts and an assignee was appointed. The assignee filed his bill against the assignees under the state law, praying that the assignment under the state law be set aside, and the assignees render an account to the assignee in bankruptcy, and that they be restrained from any further execution of the trust. The court, in dismissing the bill, says: "We find nothing in the provisions of the law which would authorize us to take this property out of the hands of the assignees under the state law and turn it over to the assignee in bankruptcy, and must therefore deny the motion for a preliminary injunction."

It does not appear clearly from the report of that case, but we suppose the fact to be, that the respondents were not acting under the insolvent laws of the state of New York, but under another act, regulating private trusts created by the act of parties for the benefit of creditors. But, viewing our law as practically a system introduced for the purpose of sequestering the effects of an insolvent debtor and distributing the avails *pro rata* among creditors, and considering that the action of the court of probate in the decrees appealed from is not inconsistent with this view, we have no difficulty in bringing the case within the ruling of Judge Nelson.

On the whole we are inclined to the opinion that the proceedings in the case now before us are not in conflict with the Bankrupt Act. We therefore advise the superior court that the reasons for appeal are insufficient.

In this opinion the other judges concurred.

The foregoing cases adopt a somewhat more restricted construction of the operation of the national bankrupt laws, than has perhaps been generally entertained by the profession. It seems to have been generally supposed that while the power given the National Congress to enact a general bankrupt law, under the Constitution, has no effect in restricting the exercise of the same power by the States, until the same is put in exercise by the national authority, its actual exercise must *ipso facto* nullify the operation of state laws in the abstract. The question is discussed very much at length by Dewey, J., in Griswold *v.* Platt, 9 Met. 9, and the cases cited in detail. The doctrine of this case, and of others here cited, seems to be that the passing of a bankrupt law, by the national authority, suspends the operation of all State laws upon the subject, except where proceedings had been already instituted, as in Judd *v.* Ives, 4 Met. 401, in which case the State laws have been allowed a modified operation, to the extent of pending proceedings. This modified exception seems to recognise the principle, that the existence of the national law does not entirely and at once exclude the *operation* of the State laws upon the same subject. And the principle thus established on the subject, in Sturges *v.* Crowninshield, 4 Wheat. 196, Ogden *v.* Saunders, 12 Id. 213, that the existence of the power in the nation will not preclude its *exercise* by the States, actually recognises the necessary corollary, that the national statute only abrogates state authority to the extent that it is inconsistent with its exercise under state laws. This being so, we do not see any serious objection to any proceedings under state laws, which are not intended to accomplish any purpose in conflict with the national law or to supersede any proceedings under such law. The result of such a distinction would seem to be that until proceedings are taken under the national law, it is competent for the parties to take any proceedings under state statutes or common law, which are not in conflict with the principles of the national law so as operate a virtual fraud upon its provisions. This seems to be the principle of the rule laid down by Mr. Justice NELSON and approved in the principal case. I. F. R.

Court of Appeals of New York.

LUCY A. WARNER ADMX., RESPONDENT; *v.* THE ERIE RAILWAY COMPANY, APPELLANT.

A railroad company in its character of master is responsible to its employees for the proper construction of its road, its adjuncts and equipments, and the selection of competent and skilful subordinates to supervise, inspect, repair, regulate and control its operations. If it fails in any of its duties in these respects, and its servant thereby sustains injury, he may recover.

If, however, these obligations are once performed, and its structures are properly made, and it employs from time to time competent and trustworthy agents to examine and test the continued sufficiency of such structures, and these tests are applied with the frequency and in the manner which time and experience have sanctioned, no action will lie though its structures turn out to be insufficient and the servant in consequence is injured. The board of directors as representing the company is under no further duty to such servant. It cannot be held to warrant the actual competency of his fellow servants. Actual notice of insufficiency must be brought home to such board of directors as representing the corporation, as a prerequisite to liability.

Where, under such circumstances, a bridge belonging to the company fell while the plaintiff in the course of his employment was passing over it upon a train:

Held, in the absence of notice of its insufficiency, that it was error to leave the question of negligence to the jury.

THIS was an action to recover damages arising from a personal injury, which resulted in the death of one of the defendants' employees. The deceased was a baggage-man, and when killed was in the discharge of his duty as such on a train of cars going from Hornellsville, east, on the defendants' railroad. One of the defendants' bridges, over the Conhocton river, fell as the train of cars was passing over it.

The jury found that the bridge fell from decay in its timbers. The bridge was properly constructed and was originally of sufficient strength for the purposes for which it was intended.

John Ganson, for appellant.

Sherman T. Rogers, for respondent.

BACON, J.—In approaching the consideration of this case, which, in the precise aspect it assumes, may be deemed in the courts of this state a pioneer case, it is important to distinguish the principles which are to decide it from those which have been held in cognate cases, and especially to ascertain the precise ground on which the charge and rulings of the judge upon the

trial proceeded, and by which we are to assume the jury were guided in rendering their verdict.

In the first place, then, it is to be remarked that the defendant in this action is not responsible, and is not to be made liable for injuries suffered by one of its employees solely through the carelessness or negligence of another employee of the defendant engaged in the same general business. The liability to injury from such a source is one which each employee takes upon himself when engaging with others in the service of a common master. It is a hazard incident to the nature of the engagement into which he entered, and in respect to which he becomes, so to speak, his own insurer.

In the second place, the cases which establish this general rule, maintain also the further qualification or extension of it, that the liability is not enlarged by the fact that an injured employee is of an inferior grade of employment to that of the party by whose carelessness the injury is inflicted and the damage caused, provided the services of each in his particular sphere or department are directed to the accomplishment of the same general end. These principles have been often under discussion, and are settled by an array of authorities which it is hardly necessary to cite in detail. Tho following, among many others, may be deemed sufficient for the purpose: *Priestly* v. *Fowler*, 3 Mees. & Wels. 1; *Coon* v. *Utica and Syracuse Railroad Co.*, 5 N. Y. 492; *Albro* v. *Agawam Canal Co.*, 6 Cush. 75.

The only ground then, which the law recognises, of liability on the part of the defendant, is that which arises from personal negligence, or such want of care and prudence in the management of its affairs or the selection of its agents or appliances, as occasioned the injury, and which care, if it had been exercised, would have averted the injury. We are not now dealing, it must be remembered, with the liability which railroad corporations assume in respect to the safety and security of passengers on their road transported for a compensation, and in regard to whom they become absolute insurers against all defects which the highest degree of vigilance would detect or provide against. The liability here, if there is any liability, is measured by that lower standard which all the authorities recognise in the case of an employee, and which is answered if the care bestowed accords with that reason-

able skill and prudence which men exercise in the transaction of their accustomed business and employments.

The ground of liability affirmed in this case, and on account of which a recovery was had, was the alleged weakness, decay, and defectiveness of a bridge of the defendant, by the falling of which the death of the intestate was occasioned. The allegations of the complaint are that the defendant did not use ordinary or reasonable care and diligence in providing a safe and suitable bridge over the Conhocton river at the place in question. That before the breaking down of the bridge the defendant had notice that it was unsafe and insecure for the passage of trains thereon, and that defendant carelessly and negligently failed to cause a suitable examination to be made of said bridge for the purpose of ascertaining whether it was unsafe and insecure. It is further alleged that if any examination was made it was made by servants and agents who were careless and incompetent to the knowledge of the defendant, and in the selection and employment of whom the defendant had not used ordinary care and diligence. With these allegations in view, as constituting in the mind of the pleader the gravamen of the action, let us see what the case really disclosed, and in what aspect it was presented to the jury.

At the close of the plaintiff's testimony there was a motion to nonsuit the plaintiff, founded on the alleged absence of a notice to the defendant of the unsafe condition of the bridge, and this motion was renewed at the close of the whole testimony. The judge, in responding to this demand, held that there was not any evidence for the jury to consider relative to the original sufficiency of the bridge, nor any testimony impeaching the competency of the defendant's employees. He further stated that there was only one question for the jury, and that was, whether the board of directors themselves, as representing the defendant, and as distinguished from the employees, were guilty of negligence in not discovering the fact that the bridge was in an unsafe condition; that if the jury should be satisfied that the bridge was unsafe from decay and that occasioned its fall, and the directors were guilty of negligence in not discovering the fact, the plaintiff would be entitled to recover and that this question alone must go to the jury. To all which the defendant's counsel excepted.

At the close of the charge there was a request to instruct the jury in relation to the actual knowledge of the defendant's em-

ployees, and their omission to remedy such known defect, assented to by the court, which if the defendant's counsel had been content to stand upon, would have entirely precluded a recovery in this case; but I agree with the opinion of the Supreme Court that this request and instruction was virtually waived by the counsel, and revoked by the court in the subsequent ruling, and that it may therefore, on this appeal, be laid out of the case.

The first instruction of the court in answer to a request to charge that it was necessary to show that the decay was known by some notice or otherwise to the president and directors, was that if the board of directors by the exercise of that care and skill that is to be expected of persons occupying the same position, could by the exercise of reasonable diligence and skill have ascertained or known the defects in the bridge, the failure on their part to ascertain would make the defendant liable, because it is negligence, and substantially the same as if notice had been given to the board. To this proposition the defendant's counsel excepted.

There is a little vagueness, and perhaps inaccuracy, in the expression used, as to the care and skill which was "to be expected in persons occupying the same position," which might possibly have tended to mislead or confuse the jury, had not the judge in the earlier part of the charge explained, that the care and diligence which the directors were required to bestow, was that reasonable care, skill, and foresight in the affairs of the corporation, which reasonable and prudent men occupying such positions ordinarily exercise under the same circumstances. With this qualification, I think the charge is not liable to any serious misconstruction, and presents with sufficient distinctness the proposition the judge was expected to charge, and the one he actually presented to the jury. Let us see now what the case disclosed upon the concession of all the parties, and upon clear and uncontroverted evidence. We start with the admission that there was no question as to the original sufficiency of the bridge, and no impeachment, whatever, of the competency of the defendant's employees. Two leading and important averments of the complaint are thus disposed of *in limine*. It is then proved by evidence not sought to be contradicted, that by these competent agents a frequent inspection and examination of the bridge was made, the usual and accustomed tests long employed and deemed ample and sufficient were applied to the structure in its various

parts, and no imperfection or decay was detected, and none was visible upon an outward and external inspection; and, on the day before it fell, a special observation was made of the bridge while a heavy train was passing over it, and no imperfection or weakness was discovered. If it be said that the test of boring the timbers was not applied, the answer may very well be, that this is no more a certain test than the one which was applied; that it had but rarely been used upon the bridges on the defendant's road, and, so far as the testimony shows, upon any other, and carried too far becomes itself a source of weakness; and that while after a catastrophe has occurred, it is sometimes easy, and quite common to say that if something else unusual and unthought of had been done, it might possibly have been averted. Ordinary care and diligence, which is the acknowledged measure of the defendant's obligation, does not require the application of these unusual tests, nor the employment of the utmost possible safeguards.

There was one more element invoked to attach liability to the defendant consequent upon the fall of this bridge, and that was the length of time it had stood. It was constructed in the fall of 1855, and had remained until the time of the accident, a period of about nine and a half years. The evidence showed that bridges of similar construction and materials, upon the defendant's road, had stood over ten years, and were considered, and to all appearances were, sound and safe—some had stood over fourteen years, and one over seventeen years in the same condition. Although some of the witnesses for the plaintiff testified that they would not consider such a bridge as safe beyond the period of seven or eight years, yet, if upon adequate and repeated inspection, and the application of appropriate tests, no defect was exhibited, a mere opinion as to the length of time such a bridge might be expected to stand, would have no appreciable weight in the scale of evidence. There is really then no conflict of evidence as to the care and skill used in the construction and maintenance of this bridge; the inspection to which it was subjected; the adequate skill and competency of the employees engaged in that specific duty; the experience of defendants both in the construction and duration of such structures; and the absolute want of any actual notice to defendant, or any of its employees, of any defect, real or suspected, in this bridge. And this being so upon undisputed evidence, the conclusion in my judgment is inevitable, that

the defendant was not guilty of the want of such care in respect to their employees, as it was their duty (representing, as it is conceded the board of directors do, the corporation) to bestow upon its affairs. If this conclusion is sound, then it seems very clear to me, that it was the duty of the court to take the case from the jury, and hold that on the established facts the plaintiff could not recover. But that at all events the defendant was entitled to the instruction the counsel asked, to wit, that in order to charge the defendant, it was necessary for the plaintiff to show that the decay in the bridge (if it fell from decay) was known by some notice or otherwise to the president and directors of the road.

The true principle applicable here is, I think, that when the defendant has erected a structure to be used in its ordinary and accustomed business, without fault as to plan, mode of construction, and character of materials, so that it was originally sufficient for all the purposes for which it is to be used, employs skilful and trustworthy agents to supervise, examine and test it, and that duty is performed with frequency, and with such tests as custom and experience have sanctioned and prescribed, it has exercised such care and skill as the law exacts of an employer in reference to his employee; and that no liability can attach to a party for a defect in such structure, by which an employee has sustained an injury, unless there has been actual notice or knowledge that defects existed, which, unless promptly remedied, would be liable to produce serious or fatal consequences.

A broader liability than this cannot be imposed without, in my opinion, breaking down and obliterating the distinction which exists between the responsibility incurred to a passenger and an employee; and the rule laid down by the court in this case, would practically make the railroad company an insurer of the latter, as well as of the former, and in the words of a learned judge in a parallel case, "a latent defect in a steam boiler, a rotten plank in a ship, a flaw in an iron rail, an unknown weakness in a floor, would charge the master with all the damages to his employees in consequence thereof."

A different and more stringent rule than I have thus suggested, would impose an intolerable burden upon a board of directors, and carried to its legitimate results, would require them to give their individual and personal attention not only to the construction, but to the actual existing condition of their road, with all its struc-

tures, appliances, and machinery. They must supervise and constantly examine every locomotive, passenger and freight car, rail, tie, wheel, axle, and brake, and be responsible for the consequences that may arise to an employee, for a latent defect not cognisable by the senses of an experienced and skilful mechanic, nor capable of detection by the faithful application of well-known, long-used, and approved tests. The doctrine upheld by the court in this case maintains, in effect, that a railroad corporation must have a board of directors not only possessing adequate skill to determine whether its competent employees perform their duty as between the corporation and its other employees; but if there be an omission of duty on the part of such skilful employees which the directors have themselves failed to discover, the corporation is guilty of negligence, and responsible to an injured employee for all the consequences resulting therefrom. Such a rule I am persuaded would carry their corporate liability not only beyond reason, but beyond the fair scope of any authority which has been invoked to maintain it.

I do not think it would be profitable to go over in detail the long array of authorities which have been cited by the counsel on both sides in this case, to sustain and fortify their respective positions. They have been mostly collected, and the purport of them very fully and fairly stated in the opinion prepared by Mr. Justice MILLER upon the former argument of this case. I have carefully examined them, but shall not venture to collate or comment upon them, further than to remark, that while on the one hand some of them contain statements and discussion of principles that may be invoked in favor of the claim to recover, put forth by the plaintiff's counsel, and sustained upon the trial of this cause, none of them go the full length required to uphold the ruling of the judge, while on the other hand, several cases go far, as I understand them, in maintaining the doctrine I seek to apply to this case, and in one instance the decision is fully and directly in point.

Thus in *Torrent* v. *Webb*, 18 C. B. (86 E. C. L. R.) 795, it is held that a master is not responsible for an injury to a servant for the negligence of a fellow-servant, provided the master uses reasonable care in the selection of the servant. JERVIS, C. J., in this case makes the significant remark, that the master may be

responsible where he is personally guilty of negligence, but certainly not where he does his best to get competent persons.

In the leading case of *Priestly* v. *Fowler*, 3 M. & W. 1, it was held that the servant could not recover of the master for injuries resulting from the breaking down of an iron railing from defective construction, when there was no proof of knowledge on the part of the master of the defect: Lord ABINGER remarking, that the mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself.

In our own state, the point has never been fairly presented. In *Keegan* v. *Western Railroad Co.*, 4 Seld. 175, the defendant had express and repeated notice through the reports of its own servants, of the defectiveness of the engine, through the explosion of which the injury to the plaintiff was occasioned. In *Ryan* v. *Fowler*, 24 N. Y. 410, the master had the same notice of the defectiveness of the structure, through the falling of which the plaintiff suffered the injury for which he recovered.

In *Wright* v. *New York Central Railroad Co.*, 25 N. Y. 562, a recovery by an employee against the company for an injury occasioned by the conduct of another employee, was set aside on the ground that the action could not be maintained unless the injury resulted from unskilfulness for which the company was responsible.

In discussing the principle applicable to cases of this character, Judge ALLEN says: "If the injury arises from a defect or insufficiency in the machinery or implements furnished by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same, through his own personal negligence or want of care; in other words, it must be shown that he either knew, or ought to have known, the defects which caused the injury. Personal negligence is the gist of the action."

We have been referred to a number of cases in the courts of our sister states, none of which are very apposite to this precise case, except *Snow* v. *Housatonic Railroad Co.*, 8 Allen 441, which the plaintiff's counsel invokes as a clear authority in his favor, but which is susceptible of the criticism that the defect in the track through which the injury was suffered, was palpable to view, and was known to and was very grossly neglected by the track

repairer, whose specific duty it was to remedy the defect; and the case of *Hand* v. *Vermont Central Railroad Co.*, 32 Verm. 473, which is precisely in point for the defendant, and holds this distinct proposition, that although it is the duty of a railroad corporation to exercise all reasonable care in procuring sound machinery and faithful and competent employees, and although they are liable to their servants for the neglect of this duty, yet after having performed it, they are not liable to a servant for injuries occasioned by the neglect of any of his co-servants engaged in the same general business, even though the negligent servant be superior in grade to the one injured.

It is said, and it may be conceded, that this case is in advance of any decision yet made, where the precise principle is involved; but, if so, it is in my opinion a sound and judicious advance. It does not exonerate the directors of a railroad corporation from liability for personal negligence, nor discharge them from the obligation to perform their duty, if notice or knowledge of defects or insufficiencies is brought home to them, and injury results to one of their servants from a failure to remedy the defect through which the injury occurs. It holds them to the highest measure of responsibility for the proper construction of the road, its adjuncts, and equipments, and the selection of competent and skilful subordinates to supervise, inspect, and repair, and control and regulate its operations; but, having faithfully performed these duties, it relieves them from the extreme rigor of a rule which would practically make them insurers of the absolute safety of, and underwriters for every injury which an employee in their service might suffer from the act or omission of his fellow-servant.

Since the argument of this case, and the preparation of the foregoing opinion, my attention has been called to the case of *Wilson* v. *Merry*, decided in the English House of Lords, in May 1866, and reported in the Law Reports, Appellate Series, part 3d, for July 1868, p. 326. It was a Scotch appeal in a case where a verdict had been recovered against the proprietors of a coal-mine, for the death of a party, occasioned as was alleged, by the defective construction of a scaffold in the mine. Without recapitulating the facts, it may be sufficient to state that the case turned upon the liability of the master for an injury to his employee, where the master did not personally superintend the work, but devolved it upon a suitable mechanic or foreman, superior in grade to the injured employee.

Opinions were given by the Lord Chancellor, Lord CAIRNS, and by the ex-Chancellors, Lord CRANWORTH and Lord CHELMSFORD, all substantially concurring in the conclusion, that the duty of the master was to select proper and competent persons to do the work, and furnish them with adequate materials and resources for its accomplishment; and when he had done that, he had performed his whole duty. In the course of his opinion, Lord CAIRNS says: "The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master, in that which he the master has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business; but to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work." He adds: "If the persons so selected are guilty of negligence, this is not any negligence of the master; and if an accident occurs to a workman to-day, in consequence of the negligence of another workman—skilful and competent—who was formerly, but is no longer in the employment of the master, the master is not liable, although the two cannot technically be described as fellow-workmen; negligence cannot exist, if the master does his best to supply competent persons. He cannot warrant the competency of his servants." The case is very instructive, as containing the latest utterance of the highest court in England, and the opinions of all the learned Lords maintain, with great distinctness and force, the principle of liability which I have endeavored, as well as I was able, to illustrate and enforce in the foregoing opinion, and which should, I think, govern in the disposal of this case.

The judgment should be reversed, and a new trial granted, with costs, to abide the event.

Judgment accordingly, five judges concurring therein.

Supreme Judicial Court of Massachusetts.

SAMUEL P. SHAW *v.* A. W. SPENCER AND OTHERS.

The holder of stock as trustee has *primâ facie* no right to pledge it as security for his private debt, and one who takes it under such circumstances does so at his own peril.

The word "trustee" in the certificate is notice to all persons to whom the certificate may be delivered, sufficient to put the taker on inquiry as to the nature of the trust and the lawfulness of the pledge.

No usage of brokers or course of business can avail against these rules of law, and therefore evidence of such usage is inadmissible.

Where the equitable owner of stock which has been pledged unlawfully by the trustee, has given notice of his rights to the pledgee, his mere presence and failure to object to the payment by the pledgee, of an assessment on the stock, does not stop him from the legal assertion of his title, though equity will require him to refund the amount so paid.

BILL in equity against Spencer, Vila & Co. and Mellen, Ward & Co., two firms of brokers in Boston, and the Calumet Mining Company, a corporation under the law of Michigan, praying for an injunction to restrain Spencer, Vila & Co. from making any sale or transfer of two thousand shares of the stock of that company, or of the certificates of the same, and the company from recognising the validity of any such sale or transfer otherwise than to the complainant.

At the hearing before WELLS, J., the material facts appeared as follows: On the 28th of February 1867, Spencer, Vila & Co. received from New York United States bonds to the amount of $100,000, with a draft for $106,735 on Mellen, Ward & Co., to whom they were to deliver the bonds on payment of the draft. Mellen applied for, and obtained, the bonds, promising to return with currency or a cashier's check, which he did not do. Mr. Vila, after calling once or twice unsuccessfully at the office of Mellen, Ward & Co. for the money, at last saw Mellen, who offered his check for the whole amount, which was refused. Mellen then offered a check of Kidder, Peabody & Co. for $50,000, and the check of Mellen, Ward & Co. for the balance with collateral security, this latter check to go into the bank the next day. This proposal was accepted, and just before two o'clock (the hour of the closing of the Boston banks), the collateral security was delivered to Spencer, Vila & Co., and the check was deposited. The collateral security thus taken consisted of two

certificates for one thousand shares each of stock in the Calumet Mining Company, standing in the name of "E. Carter, trustee," with a transfer in blank on the back of each, subscribed "Edward Carter, trustee" (Carter being a member of the firm of Mellen, Ward & Co.); and the certificates were expressed to be "transferable only on the books of the company, by the holder thereof, in person, or by a conveyance in writing recorded in said books, and surrender of this certificate," and were dated February 7th. The blank transfers were dated February 8th. The shares which these certificates represented had been owned by Quincy A. Shaw, and were part of a larger number which he had transferred to certain trustees, including himself and the complainant, to secure certain indebtedness, and which these trustees afterwards transferred to the complainant. And they had been transferred by the complainant into the name of "E. Carter, trustee," as collateral security for certain acceptances made by Quincy A. Shaw on drafts of the Huron Mining Company, which had been taken by Mellen, Ward & Co. for negotiation, who gave for them the following receipt:—

"Boston, February 8th 1867. Received of S. P. Shaw two certificates of stock in the Calumet Mining Company of Michigan, being for two thousand shares in all, each certificate being of one thousand shares, to be used as collateral for acceptances of Q. A. Shaw of Huron Mining Company drafts, which we bind ourselves to return to said S. P. Shaw whenever said acceptances are paid. Said certificates are in the name of E. Carter, trustee.

"MELLEN, WARD & Co."

On the 28th of February nothing was due to Mellen, Ward & Co. on these acceptances. On March 1st, Mellen, Ward & Co. failed, and their check which Mellen gave to Spencer, Vila & Co. was dishonored, and remains unpaid. On that day Mr. Farley, a member of the firm of Spencer, Vila & Co., filled the blanks in the transfers of the certificates with the name of that firm, and presented them to Quincy A. Shaw as transfer-agent of the Calumet Mining Company, with a request for the transfer to be made and new certificates to be issued in the name of the firm, which was at first declined by Mr. Q. A. Shaw on the ground that he wished to make some inquiries, and afterwards on the ground that an assessment of $5 per share which had been made on the capi-

tal stock was due and unpaid on the shares in question. The next day Mr. Q. A. Shaw heard that Spencer, Vila & Co. held the stock as security for a debt of Mellen, Ward & Co., and not as collateral for Huron Mining Company paper, and addressed to them the following notice: "Boston, March 2d 1867. Messrs. Spencer, Vila & Co.,—Please to take notice that the certificates of stock of the Calumet Mining Company in your hands, and in the name of E. Carter, trustee, are my property, and that I have never received value thereon. Please hold them subject to my direction. Yours respectfully, QUINCY A. SHAW, for self and others, trustees." During the few days following, Mr. Q. A. Shaw had several conversations with Mr. Vila, in which he proposed to submit the question of the title to the stock to certain referees, which proposition Mr. Vila declined. About this time the complainant became president, and Mr. Q. A. Shaw treasurer, of the Calumet Mining Company; and, on March 18th, at the office of the company, Mr. Vila paid the assessment due on the shares in question to the treasurer, in the presence of the complainant, who made no demand for the stock on that occasion. The next day, Mr. Q. A. Shaw returned the amount of this payment to Spencer, Vila & Co. in a letter subscribed like his former letter above recited, and stating that "the assessment was paid and received by mistake," and that the stock was owned by himself; but they refused to receive the amount thus returned. On March 26th, the complainant served notice on the firm that the stock was his property, and requested them to deliver to him the certificates with such endorsements as would enable him to obtain it; and on the same day he filed this bill.

The respondents offered testimony to show: "1. That it is usual with dealers in the stock market to deliver, by way of sale or pledge, certificates of stock, with a blank transfer upon the back; 2. That it is usual for holders of certificates of stock, transferred in blank, to fill them up by inserting the name of some person as transferee or purchaser; 3. That it is a matter of common occurrence for certificates of stock to be issued in the name of some other person as trustee, when in fact there is not any trust; 4. That certificates of stock, issued to a designated person as trustee, are constantly bought and sold in the stock market, by a simple endorsement of the certificate by the person named as the holder, without inquiry as to the authority by which,

or as to the use or purpose for which, the transfer was made." But the judge ruled that, "as to the first two, the facts proposed to be shown were immaterial; and, as to the last two, by the rules of law they were inadmissible."

S. Bartlett and *F. Bartlett*, for the complainants.

B. R. Curtis, *C. B. Goodrich* and *J. M. Keith*, for the respondents.

The opinion of the court was delivered by

FOSTER, J.—The court have bestowed upon this case a degree of attention commensurate with the importance of the principles on which its decision must depend and the magnitude of the amount involved. One of two innocent parties must bear a heavy loss, caused by the gross fraud of a third person.

Under the circumstances disclosed by the evidence it was a flagrant breach of trust, and a criminal fraud on the part of Carter to transfer the certificates of stock to Spencer, Vila & Co. They were the property of the complainant, who is entitled to reclaim them from any one but a *bonâ fide* holder for value without notice. Charles Mellen, a member of the firm of Mellen, Ward & Co., as collateral security for a debt due from that firm to Spencer, Vila & Co., handed to them two certificates of stock in the Calumet Mining Company, for 1000 shares each, standing in the name of another member of that firm, viz., "E. Carter, trustee," and by him transferred in blank. Spencer, Vila & Co. received the certificates thus endorsed in blank with the name of E. Carter, trustee, for a valuable and adequate consideration, without other notice of any defect in title than such as the law may impute from the word "trustee" in the body of the certificates and after the signature of Carter upon the blank transfers.

It is clear that a certificate of stock transferred in blank is not a negotiable instrument: *Sewall* v. *Boston Water Power Co.*, 4 Allen 282. Each of these certificates is expressed on its face to be "transferable only on the books of the company by the holder hereof in person, or by a conveyance in writing recorded in said books, and surrender of this certificate." No commercial usage can give to such an instrument the attributes of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name must fill out the

blanks, as they were filled in the present instance, so as to derive title to himself directly from the last-recorded stockholder, who is the only recognised and legal owner of the shares.

It cannot possibly be material whether the manual delivery of the certificates was by Mellen or by Carter himself. Unless the word "trustee" may be regarded as mere *descriptio personæ*, and rejected as a nullity, there was plain and actual notice of the existence of a trust of some description. A trust as to personalty or choses in action need not be expressed in writing, but may be established by parol. And that the mere use of the word "trustee" in the assignment of a mortgage and note imports the existence of a trust, and gives notice thereof to all into whose hands the instrument comes, has been expressly decided by this court: *Sturtevant* v. *Jaques*, 14 Allen. See also *Bancroft* v. *Corsen*, 13 Id. 50; *Trull* v. *Trull*, Id. 407. It is insisted on behalf of the respondents, that even if there was actual notice of the existence of a trust there was no notice of its character, and that the trust might have been such as to authorize the transfer which was made by Carter. But, in our opinion, the simple answer to this position is, that where one known to be a trustee is found pledging that which is known to be trust property to secure a debt due from a firm of which he is a member, the act is one *primâ facie* unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. The appropriation of corporate stock held in trust, as collateral security for the trustee's own debt, or a debt which he owes jointly with others, is a transaction so far beyond the ordinary scope of a trustee's authority, and out of the common course of business, as to be in itself a suspicious circumstance, imposing upon the creditor the duty of inquiry. This would hardly be controverted in a case where the stock was held by "A. B., trustee for C. D." But the effect of the word "trustee" alone is the same. It means trustee for some one whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust* than the property of one whose name is known. In either case it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word "trustee" alone has no meaning or legal effect.

Inasmuch as such an act of pledging property is *primâ facie* unlawful, there would be little hardship in imposing on the party who takes the security, not only the duty of inquiry, but the burden of ascertaining the actual facts at his peril. Where a partner assumes to give for his own private debt the note of his firm, the creditor who takes it must show that it was given with the assent of the other partners, because it is an apparent misuse of the name of the firm, and *primâ facie* evidence of fraud: *Eastman* v. *Cooper*, 15 Pick. 290. But we need not go to that length in deciding the present case. Notice of the existence of a trust is by all the authorities held to impose the duty of inquiry as to its character and limitations. And whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry might have led.

The objection that in the present case the only persons of whom inquiry could have been made were Mellen and Carter, who committed the breach of trust, is sufficiently answered by the words of Sir JOHN ROMILLY, Master of the Rolls, in a recent and leading case. "With respect to the argument that it was unnecessary to make any inquiry because it must have led to no results," he says, "I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones* v. *Smith*, 3 Mylne & K. 699, that a false answer or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry; but I think it impossible beforehand to come to the conclusion that a false answer would have been given which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, viz., a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say:" *Jones* v. *Williams*, 24 Beav. 62. These remarks also explain the cases cited by the respondents, of *Buttrick* v. *Holden*, 13 Met. 255, and *Calais Steamboat Co.* v. *Van Pelt*, 2 Black. 377. In each of these cases the party did make inquiry and relied upon the answers received, which were of a character calculated to put him off his guard.

If it be asked of whom the respondents could have inquired as to the meaning of the words "E. Carter, trustee," the nature of the trust thereby indicated, and the existence of the power to pledge for the debts of the firm of Mellen, Ward & Co., which Carter was assuming to exercise? the answer is, that the inquiry

could have been made of Mellen, and if he replied that he did not know the nature of the trust, then the duty of the respondents would have been to ask Carter himself for an explanation, which it certainly was in his power to give. It is not to be assumed that false answers would have been made, and the respondents have been thereby deceived and misled. On the contrary, the probabilities are that such an investigation would have led to the discovery of the truth.

Or, if Spencer, Vila & Co., before taking the stock certificates as collateral security, had been prudent enough to require a transfer to be made to them on the books of the corporation, this step would have brought them into contact with Quincy A. Shaw, and have exposed the whole attempted fraud. Some of the cases say that constructive notice is imputed only on the ground of gross negligence. But if it be so, a court of equity must hold it to be a want of ordinary prudence, or *crassa negligentia*, to omit all inquiry where there is actual notice that a trust of some kind exists, and the use proposed to be made of the trust property is *primâ facie* a misappropriation.

The case of *Ashton* v. *Atlantic Bank*, 3 Allen 217, is not in conflict with these views. It does not proceed on the ground that there was no duty to inquire, but that upon inquiry and examination of the will creating the trust it would have appeared that the trustee might have the right to use the trust funds as he did. He raised money upon the stocks by a discount of his own note with them as collateral; and the court said that it might have been incident to his duties "to discount the trust funds for the sake of making a permanent investment," or "the purchaser might reasonably assume that the money was wanted to discharge liability incurred under the will. Such a case was well warranted by the will creating the trust." In short, the court came to the conclusion that the act of the trustee was in itself lawful in that particular case, and that his fraud consisted only in the misuse of the money when obtained. If this was true, of course the purchaser was not bound to see to the application of the purchase-money.

Hutchins v. *State Bank*, 12 Met. 421, was the case of a sale of shares of bank stock by an executrix. It is the established rule of equity that "purchases from executors of the personal property of their testator are ordinarily valid, notwithstanding it may be affected with some peculiar trust or equity in the hands of

the executor; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator to which they are legally liable before all other claims. But if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside:" Smith Manual Eq., tit. 1, c. iv. 10. "Where an executor disposes of or pledges his testator's assets in payment of, or as security for, a debt of his own, the person to whom they are disposed of or pledged will take them subject to the claims of creditors and legatees:" *Elliot* v. *Merryman*, 1 Lead. Cas. in Eq. 89; *Hill* v. *Simpson*, 7 Ves. 152. The same doctrine was held by Chancellor KENT, in 1823, in *Field* v. *Schieffelin*, 7 Johns. Ch. R. 150, who, upon a review of all the cases down to the time of that decision, thus sums up the result: "The great difficulty has been to determine how far the purchaser dealt at his peril when he knew from the very face of the proceeding that the executor was applying the assets to his own private purposes as the payment of his own debt. The later and the better doctrine is that in such a case he does buy at his peril." Chief Justice GIBSON, in *Petrie* v. *Clark*, 11 S. & R. 377, expressly announces the doctrine "that an executor's applying the assets in payment of his own debt is of itself a circumstance of suspicion which ought to put the purchasing creditor upon inquiry as to the propriety of the transaction."

The power of disposition over his testator's assets which an executor has, is as extensive as that of a trustee, and the conversion of the testator's personal estate into money is within the ordinary line of an executor's duty. Consequently the authorities which have been cited as to the liability of those dealing with executors are fully applicable to the case of one who takes trust property from a trustee as security for his private indebtedness.

We proceed to consider the testimony offered by the respondents and excluded by the judge at the hearing.

The fact that it is usual for dealers in stock to take certificates with blank transfers upon them and to fill them up with the names of purchasers, was wholly immaterial. Such a practice, as we have already observed, does not make the shares negotiable, and the purchaser whose name is written into the transfer must always derive his title immediately and solely from the stockholder of record. The point is not made by the complainant that a transfer in blank is out of the usual course of business, or a suspicious

circumstance, so that evidence of usage was not requisite to repel such an inference.

The fact that it is common to issue certificates of stock in the name of one as trustee when no trust actually exists, has no legal bearing on the decision of the present case.

The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word "trustee" after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question whether the word "trustee" alone has any significance and does amount to notice of the existence of a trust.

But this has been heretofore decided, and is no longer an open question in this Commonwealth: *Sturtevant* v. *Jaques*, *ubi supra*.

The circumstance that stock certificates issued in the name of one as trustee and by him transferred in blank, are constantly bought and sold in the market without inquiry, is likewise unavailing. A usage to disregard one's legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts.

It is to be borne in mind that the question under discussion is not whether one holding stock as trustee may sell it in the market and pass a good title to the purchaser. We do not intimate that this cannot be done. The distinction between a sale and a pledge of trust property is palpable and manifest. Nor is the present question whether a trustee may borrow money on the pledge of stock held in trust. We do not decide that such a transaction may not under some circumstances be sustained. These questions are left to be adjudged when they arise. The point now decided is that one holding stock as trustee has *primâ facie* no right to pledge it to secure his own debt growing out of an independent transaction; and that whoever takes it as security for such a debt without inquiry, does so at his peril. All the proffers of evidence taken together fall short of showing any usage to do this: and no evidence of usage could legalize such conduct. Because Spencer, Vila & Co. took these certificates of stock to secure an antecedent debt from Mellen, Ward & Co. to them with notice that they were held in trust, and made no inquiry as to Carter's authority to use

trust property for such a purpose, they cannot retain the security against the equitable owner of the stock, when it appears that Carter in making the pledge was guilty of a fraudulent breach of trust.

The remaining questions relate to the effect of the payment on the 18th of March of the assessment of $10,000 on this stock by Spencer, Vila & Co. to Q. A. Shaw, treasurer and transfer agent, in the presence of S. P. Shaw, the complainant. On the 2d of March, Spencer, Vila & Co. had received written notice from Q. A. Shaw that Carter had no right to transfer the stock to them, and that their title to it was contested. By receiving the money, which Spencer, Vila & Co. voluntarily offered to pay, the Messrs. Shaw did not induce them to change their position, or deprive them of any rights. They had taken the stock certificates nineteen days before they made the payment, and, when it was made, they had no reason to believe that either S. P. Shaw or Q. A. Shaw intended to abandon their claim, or to waive any of their rights. Q. A. Shaw could not have done so by any act of his own: S. P. Shaw did no act, and only omitted to object to the payment of the assessment. The payment was evidently the voluntary act of Spencer, Vila & Co., intended to fortify their own position, and to entitle them to a new certificate of the stock if their title should prove good. It was made for their own benefit and protection, and no act or declaration of the Messrs. Shaw deceived or misled, or induced them to make it. A waiver is an intentional relinquishment of a known right. An estoppel of the description relied on in this case can be maintained only on the ground that by the fault of one party another has been induced innocently and ignorantly to change his position for the worse in such a manner that it would operate as a virtual fraud upon him to allow the party by whom he has been misled to assert the right in controversy. These simple definitions of the terms "waiver" and "estoppel" exclude the possibility of applying either doctrine to the effect of the payment of this assessment.

The amount paid, with interest, must be refunded before any decree can be made requiring the respondents to retransfer the certificates to the complainant. As the bill contains no special prayer for this relief, and no offer to refund the money, it will require amendment before such a decree can be entered. But the injunction heretofore granted is made perpetual.

United States Circuit Court, District of Wisconsin.

JAY C. AKERLY *v.* LEVI B. VILAS AND OTHERS.

After a state court has made an order under the Act of Congress for the removal of a cause to a United States court, any further proceedings in the state court or in any other state court by appeal or other process, are void.

A state court making an order for the removal of a cause to a United States court, has no jurisdiction to allow an appeal from such order and to enjoin its clerk from certifying the record pending the appeal.

Where the clerk refuses under such an order to certify the record to the United States court, the latter will, on motion, allow the record and proceedings to be supplied by copies or affidavits, and the cause to proceed as if the record had been duly certified.

Where a state county court has given judgment which has been reversed by the Supreme Court of the state, and judgment entered in effect ordering a *venire de novo*, the cause has not reached final hearing or trial, and a motion to remove to a United States court is in time.

THE plaintiff, a citizen of New York, sued Vilas, a citizen of Wisconsin, and others, in the Circuit Court of Dane county. In October 1868, plaintiff asked the court, under the Act of Congress of March 2d 1867 (Statutes 1867, p. 558), to remove the cause to the Circuit Court of the United States, and on November 8th 1868 the court made an order to that effect, but gave the defendant leave to appeal from this order to the Supreme Court of the state, and enjoined its clerk from certifying the record pending such appeal. The clerk having refused to certify the record, the plaintiff now came into this court with affidavits of the facts and moved for an order allowing him to file in this court copies of the process, pleadings, and other proceedings in the cause, and that the cause might thereupon proceed as if regularly instituted in this court.

Opinion by

MILLER, D. J.—This motion is made under the Act of March 2d 1833, § 4 (4 Stat. 634, Bright. Dig. tit. *Circuit Courts*, pl. 21), which enacts that "In any case in which any party is, or may be by law entitled to copies of the records and proceedings in any suit or prosecution in any state court to be used in any court of the United States, if the clerk of said court shall upon demand, and the payment or tender of the legal fees, refuse or neglect to deliver to such party certified copies of such record and proceed-

ings, the court of the United States in which such record and proceedings may be needed, on proof by affidavit, that the clerk of such court has refused or neglected to deliver copies thereof on demand as aforesaid, may direct and allow such record to be supplied by affidavit or otherwise, as the circumstances of the case may require or allow, and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such process awarded, as if certified copies of such records and proceedings had been regularly before the said court." The requirements of removal of causes from a court of a state to a court of the United States, according to the Act approved March 2d 1867, 14 Statutes 558, are, that a suit must be pending in the state court at the time of the application for removal, in which there is a controversy between a citizen of the state in which the suit is brought, and a citizen of another state, and the matter in dispute exceeds the sum of $500 exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he shall make and file in such court an affidavit stating that he has reason to, and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may at any time before the final hearing or trial of the suit file a petition in such state court for the removal of the suit into the next Circuit Court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony, and other proceedings, &c. And it shall be thereupon the duty of the state court to accept the surety and proceed no further in the suit.

The Circuit Court of Dane county was satisfied that all the requirements of the act were complied with by plaintiff, and on inspection of the record found that there had not been a final trial or hearing of the suit. The court then accepted the surety offered, and ordered that all proceedings in the suit be stayed. In the 12th section of the Act of 1789, 1 Statutes 73 (Bright. Dig. tit. *Circuit Courts*, pl. 19), is the same provision in respect to the surety upon an application for the removal of causes from state to United States courts, "that it shall be the duty of the state court to accept the surety and proceed no further in the cause." The Supreme Court of the United States in *Gordon* v. *Longest*, 16 Peters 97, decided that when the application for the

removal of a cause is in proper form, and the facts on which the application is founded are made to appear according to the requirement of the act, the party is entitled to a right to have the cause removed under the law of the United States, and the judge of the state court has no discretion to withhold the right. And when on application for the removal, it is shown that the case is one embraced by the act, and that the party has complied with the required conditions, it is the duty of the state court to proceed no further in the cause," and every step further taken in the case, whether in the same court or in an appellate court, is *coram non judice*, and of course nugatory. See also *Kanouse* v. *Martin*, 15 Howard 198. Submitting to the authority of the Act of Congress and of the decisions of the Supreme Court of the United States, I have no other discretion than to decide that the clerk of the Circuit Court of Dane county was not justified in withholding the transcript from the plaintiff, either under the prohibition of the court, or by reason of the appeal after acceptance of the surety, and the order of removal of the cause to this court.

I will dispose of the remaining positions of the defendant's counsel as if upon a motion to remand the cause to the Dane Circuit Court.

It is objected that all the defendants are not citizens of the state of Wisconsin. Levi B. Vilas and Esther G. Vilas, his wife, are the principal party defendants. They are the parties to the mortgage in suit. It is alleged that Martin T. Vilas, one of the defendants, is a citizen of the state of Vermont, and is the owner of the equity of redemption of the mortgaged premises. Thomas Reynolds and Leonard J. Farwell, the remaining defendants, are citizens of this state. It is set out in the petition for removal that the persons named as defendants, except Levi B. Vilas and wife, have been either personally served with process issued in the cause, or have voluntarily entered their appearance, and that all the defendants except Levi B. Vilas have by the rules and practice of the court confessed and admitted the plaintiff's cause of action, by not answering the complaint of plaintiff, as required by law and rules and practice of the court. The state court finds that in this action now pending there is a controversy between Jay Camiah Akerly, plaintiff, and Levi B. Vilas, one of the defendants. From this it would seem that the allegation of the petition that the complaint had been taken as confessed against all the

defendants except Levi B. Vilas is correct. The service and appearance of those defendants may possibly require them to appear and answer a new bill to be brought in this court, or in default of an answer to let the bill be taken as confessed against them. But whether such be the practice or not I need not now determine. At the final hearing a question may be raised whether a decree can be made irrespective of these defendants. At present they do not appear to be necessary parties. See *Wood and Others* v. *Davis*, 18 Howard 457.

Another objection to the removal of the cause to this court is, that the application was not made "before the final hearing or trial in the state court."

It appears from a report of the case in 21 Wisconsin Rep. 88, that the suit is for foreclosure of a mortgage given by Levi B. Vilas and wife to secure the payment of certain bonds. That the cause came on to be heard between the plaintiff and Vilas, the defendant, and a decree was rendered against the plaintiff, the court holding that the bonds and mortgage were invalid, from which decree the plaintiff appealed to the Supreme Court. And the defendant also appealed for alleged error of the court in striking out his counter claims and rejecting evidence in support of them. The Supreme Court decided that the bonds and mortgage were valid, and that one of the counter claims was improperly stricken out, and reversed the judgment of the Circuit Court on both appeals. The cause came on a second time to be tried before the Circuit Court, when a decree was rendered in favor of plaintiff, from which defendant Vilas appealed upon the ground of the rejection by the court of a certain counter claim set up in his answer. The Supreme Court reversed that judgment or decree, and remanded the cause to the Dane Circuit Court for further proceedings according to law. If the cause had been finally determined by either judgment of the Circuit Court, or by order of the Supreme Court, then the application for removal would not have been filed before "the final hearing or trial." But the last order of the Supreme Court reversing the judgment of the Circuit Court and remanding the cause to that court for further proceeding according to law, opened the whole case to litigation, the same as if no judgment had ever been rendered. The Supreme Court in effect ordered a *venire facias de novo*, which required the Circuit Court to hear the cause as if no hearing or trial had taken

place. The whole proceedings were *in fieri* when the petition for removal was presented to the Circuit Court. I am therefore of the opinion that the petition was presented before the final hearing or trial of the cause.

The motion of plaintiff is granted.

Superior Court of Massachusetts. Worcester.

GEORGE W. SAWYER *v.* UNITED STATES CASUALTY COMPANY.

The words "totally disabled from the prosecution of his usual employment," in an accident insurance policy, mean *wholly disabled from doing substantially all kinds of his accustomed labor, to some extent.* A disability that prevents his doing as much in a day's work as before is not total, but one that entirely prevents his doing certain portions of his accustomed work is total, though there are other portions that he is able to do.

THIS was an action upon a policy of insurance against injury by accident, containing the following clause:—"If the said assured shall sustain any personal injury which shall not be fatal, but which shall absolutely and totally disable him from the prosecution of his usual employment, then, on satisfactory proof of such injury, compensation shall be paid him at the rate of ten dollars per week so long as he shall be totally disabled as aforesaid in consequence of such injury; provided, however, that, for any single accident, such compensation shall not be extended over a period exceeding twenty-six weeks."

The plaintiff claimed compensation for the full period, and the defendants denied his right to recover at all.

The plaintiff, who was a farmer, was in his barn unloading his wagon of corn in the stalk, and hanging the corn upon the beams. He was standing about fourteen feet from the floor upon a plank, which rested on the rounds of two ladders leaning against the hay piled in bays on each side of the barn floor. While reaching up to arrange the corn, one of the ladders slipped on the hay, and the plaintiff fell to the barn floor, striking his back against the corner of the wagon. For some days he suffered great pain, being confined to his bed for three days and to the house for about a week, and was unable to do any work for about a month,

though he could ride without inconvenience in an easy carriage. He then and constantly afterwards tried to do what he could of the farm work. He could milk a little and do some light work in the barn, but could not at any time that winter carry a pail of milk into the house; nor water nor take care of his cattle. He testified against the objection of the defendants, that after the twenty-six weeks had expired on March 6th 1868, he was unable to hold the plough or to mow for more than half an hour, and could not pitch hay, though he could rake a little. He could however drive a horse and do slowly and with difficulty light work which did not require lifting. From the time of his accident until the beginning of March, 1868, he kept an extra man, chiefly to do work about the house and barn which he testified he previously did himself and would otherwise have done himself. In the last part of November he, on one occasion, in the absence of his hired man, helped his boy to load a small horse wagon with light boards, but was obliged to sit down to rest once or twice during the loading, and to take nearly three hours in doing one hour's work. During January, he two or three times sat for an hour or two on a horse sled and drove a pair of horses breaking out roads, but all the work he did caused him pain, and, though before his accident he was accustomed to work hard and all day long with his men, he could not, for a period considerably longer than twenty-six weeks after the injury, do half-a-day's work at any time.

Edwin H. Abbott, for plaintiff, cited *Hooper* v. *The Accidental Death Insurance Company*, 5 Hurl. and Norm. 545, and asked the court to rule that if the plaintiff was wholly disabled from prosecuting his usual employment as he usually prosecuted it, and was wholly incapable of doing what he usually did before he was hurt, then he was absolutely and totally disabled, within the meaning of this policy, from the prosecution of his usual employment, and was entitled to recover compensation for the period during which he continued to be so disabled; and that whether or not the plaintiff could do some small portion of his usual work, was immaterial and did not affect his right to compensation for the time during which he was wholly incapable of doing his ordinary and usual work as he usually did it.

Thomas H. Russell, for defendant, asked the court to instruct the jury that if the plaintiff was able to go about his farm; to

ride; to superintend the work; to buy and sell; to drive a pair of horses in team breaking out roads in snow; and was able to transact generally the business of his farm or mill (if those were his usual employments), then he was not totally and absolutely disabled within the meaning of the policy.

REED, J., declined to give either instruction in the terms prayed for, and charged the jury that, if the plaintiff has met with such an accident as is described in the policy, he is entitled to recover, at the rate agreed on in the policy, for such time as by reason of such accident he is rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent. When you find on an examination of the evidence that the plaintiff was able to do substantially all kinds of his accustomed work, though with less facility and to a less extent than before his injury, then his right to recover ceases. The mere fact that a man cannot do a whole day's work, or that by a day's work he cannot accomplish so much as before the accident, is not sufficient to entitle him to recover, but he must satisfy you that for a time, by reason of his accident, he is deprived of the power to do to any extent substantially all the kinds of labor which constitute his usual employments. For such time he can recover, and no longer.

For instance, if a farmer accustomed to perform all the kinds of labor usually done by farmers should meet with such an accident, and the result should be that he was left able only to milk his cows, but unable to do the other usual farm work, while that state of things continued he would be entitled to recover. So in case of a merchant; if his accident confined him to his house, although he might thus be able to make out his bills or post his books, yet, if he were unable to do the other work ordinarily done by merchants of his class, and such work as he was accustomed before to do, for such time he would be entitled to recover.

The phrase *substantially* all kinds of labor has been used in these instructions. By that such a case as this is intended to be covered: If you find that at a certain time the plaintiff was able to do all such work to some extent as he ordinarily was accustomed to do, then his right to recover ceases, although you may find he was still unable to perform some kinds of extraordinary labor which before the accident he sometimes did.